ACQUISITION OF CUSTOMARY RIGHTS IN ALIENO SOLO.—Customary rights *in alieno solo* are obviously anomalous in that they are not on the one hand appurtenant to any land, nor are they in gross, for the right to exercise them depends, not on a man's inheritance from his ancestors, but solely on his own personal status, either as an inhabitant of a given community,[1] or as a member of a particular class,[2] all members of which have exercised the right in question from time immemorial. These rights constitute also an exception to the rule against perpetuities; they are inalienable and indestructible, for a new right is created each time that a person becomes an inhabitant of a village where such a customary right exists; and no action by the inhabitants of a community can prevent the acquisition of this right by any person who chooses in the future to become an inhabitant.[3]

It was early held, and the decision has been followed almost without question, that these customary rights are valid only where they are in the nature of easements, and not when the right claimed is to take something of value from the land of another.[4] The reason generally given for the rule in the latter case is that since the inhabitants of a village are not incorporated there is no perpetually existing body which can prescribe,[5] but this reason is clearly faulty in that the objection given applies equally to the acquisition of easements by custom. Much confusion has been caused by the fallacious idea that customary rights, like incorporeal hereditaments, arise by the will of the parties, from grant, either express or implied.[6] But just as common appendant, which could not arise either by prescription or grant, but only by immemorial custom, was a survival from the days of quasi-community ownership of land,[7] it would seem that these customary rights, which likewise can be shown only by custom from time immemorial,[8] are the survivals of the multitudes of local customs existing before the formulation of the general or common law.[9] The fact that such usages were necessarily contrary to the general customs which came to constitute the common law gave rise to the rule that they should be held valid only if they were good and reasonable, and the persons entitled to exercise them clearly defined.[10]

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[1]Abbot *v.* Weekly (1665) 1 Lev. 176; Fitch *v.* Rawling (1795) 2 H. Bl. 393; Mounsey *v.* Ismay (1863) 1 H. & C. *729.

[2]For example the victuallers of England. Tyson *v.* Smith (1838) 9 A. & E. 406.

[3]Gray, Perpetuities, § 574.

[4]Smith *v.* Gatewood (1607) Cro. Jac. 152; Linn-Regis *v.* Taylor (1684) 3 Lev. 160; Grimstead *v.* Marlowe (1792) 4 D. & E. 717; Waters *v.* Lilley (Mass. 1826) 4 Pick. 145; Perley *v.* Langley (1834) 7 N. H. 233; Nudd *v.* Hobbs (1845) 17 N. H. 524; Kenyon *v.* Nichols (1848) 1 R. I. 106; Littlefield *v.* Maxwell (1850) 31 Me. 134; Smith *v.* Floyd (1854) 18 Barb. 523; Hill *v.* Lord (1861) 48 Me. 83.

[5]Constable *v.* Nicholson (1863) 32 L. J. C. P. 240; see Warrick *v.* Queen's College (1871) 40 L. J. Ch. 780.

[6]But see 1 Reeves, Real Property, § 129.

[7]1 Pollock & Maitland, History of English Law, (1st ed.) 609.

[8]Warrick *v.* Queen's College *supra.*

[9]1 Bl. Com., (Lewis's ed.) *74-*79.

[10]Wilkes *v.* Broadbent (1745) 2 Str. 1224; Selby *v.* Robinson (1788) 2 D. & E. 758; see Wilson *v.* Wilkes (1806) 7 East 121; see Tyson *v.* Smith *supra.*

These rules would seem to account for the distinction drawn between rights in the nature of easements and those in the nature of profits, for since the latter are rights to take something of value from the land, it is clear that an unduly free exercise of them might ultimately result in the exhaustion of the servient tenement.[11] This danger is obviously present in every case where a customary right is claimed, for the number of persons exercising it is limited only by the population, but it is of much less weight where the right claimed is only one of easement, a mere right to do something upon the land of another. From the view above suggested as to the origin of customary rights it follows that their existence is logically impossible in America, and in fact several American courts have refused to recognize them either upon this ground,[12] or because they consider them detrimental to the best interest of the community.[13] Others, however, taking a broader view, hold that user during the prescriptive period is proof of the existence of the custom from time immemorial.[14]

A recent case, *Earl of Chesterfield* v. *Harris* (1911) 80 L. J. Ch. 626, has presented for consideration a question depending upon these principles. The plaintiffs sought an injunction restraining the defendants, inhabitants of a certain manor, from fishing in a stream on their land. The defendants, while not seriously attempting to deny the controlling force of the foregoing rules sought to rely on an exception to the doctrine that the inhabitants of a community as such cannot acquire a *profit à prendre*. They argued that, since a grant of such a right made by the crown operates as an incorporation of the inhabitants for the purposes of the grant,[15] therefore from user from time immemorial a grant of the right and a consequent incorporation for that purpose should be presumed. Since, however, the existence of customary rights does not rest upon grant, it seems impossible to presume from the user in the principal case even a fictional lost grant from which an incorporation could be implied. In reaching this result the case is in accord with the previous authorities.[16]

EFFECT OF STATUTORY CIVIL DEATH UPON MARITAL RIGHTS.—The fiction of civil death was an expression of the purpose of the English law that those who had renounced the obligations of society by withdrawing from it or whose acts had put them under its ban, should not be entitled to the full benefits flowing from membership therein. But the fiction was always kept within the bounds of policy, and the disabilities imposed upon the different classes of such persons recognized under the early common law were by no means uniform. When, there-

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[11]See Bland *v.* Lipscombe (1854) 4 E. & B. 713.

[12]Ackerman *v.* Shelp (N. J. 1825) 3 Halst. 125; see also Post *v.* Pearsall (N. Y. 1839) 22 Wend. 425.

[13]Delaplane *v.* Crenshaw (Va. 1860) 15 Gratt. 457.

[14]Knowles *v.* Doe (1851) 22 N. H. 387.

[15]This is the accepted doctrine of the English cases. Willingale *v.* Maitland (1866) 36 L. J. Ch. 64. The right is then held by the village in trust for its inhabitants, and is not a customary right. Likewise it is held that a valid grant of a right of common may be made to an incorporated town in trust for its inhabitants. Green *v.* Putnam (Mass. 1851) 8 Cush. 21; and see Goodman *v.* Mayor of Saltash (1882) L. R. 7 A. C. 633.

[16]Chilton *v.* Lord Mayor (1878) 47 L. J. Ch. 433; Lord Rivers *v.* Adams (1879) 48 L. J. Ex. 47.